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March 3, 1997

Poo-sa'-key
960 Division Street
Bandon, Oregon 97411

Captain Gregory M. Willeford
Gaming Enforcement Division
Oregon State Police

Re: Petition for Public Records Disclosure Order:
Oregon State Police Records

Dear Poo-sa'-key and Captain Willeford:

This is the Attorney General's order on Poo-sa'-key's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Poo-sa'-key's petition, which we received on December 16, 1996,[1/] asks the Attorney General to direct the Oregon State Police (OSP) to make available the following records:

1. Inspection of The Mill Casino building by the Oregon State Building Codes Agency, the Oregon State Police's Tribal Gaming Unit, etc.

2. A comprehensive review of the compliance with the Coquille's gaming compact with the State by the Oregon State Police's Tribal Gaming Unit, etc.

[1/] We appreciate Poo-sa'-key's extending the time within which the law would have otherwise obligated us to respond to her petition.

For the reasons that follow, we grant the petition in part and deny the remainder of the petition.

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. However, the Attorney General may order a state agency to disclose records only if the agency has denied a request for public records. *See* ORS 192.450(1). The petition states that Poo-sa'-key requested and was denied the records by Captain Gregory M. Willeford, Oregon State Police Gaming Enforcement Division. Captain Willeford confirms that he denied Poo-sa'-key's request for the compliance review audit.

The records at issue were generated by OSP to determine whether the Coquille Tribe was in compliance with the Tribal-State Compact for Regulation of Class III Gaming between Coquille Tribe of Indians and the State of Oregon (Compact). The records requested are a building inspection report and a compliance review report. Each record is discussed below.

Building Inspection Report

The Attorney General may order a state agency to disclose records only when the agency has denied a request for records. ORS 192.405(1). In regard to the building inspection report of the Mill Casino, OSP has not yet denied this request. OSP has requested legal advice regarding the status of this report. Due to the complicated legal issues regarding the relationship between the state and the tribe, the legal advice on the status of this report in terms of the Public Records Law is still in progress. Because OSP has not yet received written advice with respect to this report, OSP has not responded to your request.

It is not a denial of a records request for an agency to delay a decision pending the receipt of legal advice, particularly when the request for disclosure presents issues that are legally complex. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS LAW MANUAL (MANUAL) at 15 (1995). Because OSP has not denied your request, the Attorney General has no authority to order disclosure. Accordingly, your petition is denied with respect to the building inspection report.

Compliance Review Report

The State of Oregon and the Coquille Tribe entered into the Compact, which sets forth the agreement between the state and the tribe as to how the state will regulate Class III gaming by the tribe. OSP conducted a review of The Mill Casino, the tribe's gaming facility, to determine whether the tribe was in compliance with the Compact. The compliance review report is the end result of this process.

Oregon's Public Records Law, ORS 192.410 to 192.505, operates under a strong presumption of disclosure. ***Guard Publishing Co. v. Lane County School Dist.***, 310 Or 32, 37, 791 P2d 854 (1990). ORS 192.420 provides that "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.510 to 192.505." Such exemptions are to be narrowly construed, in a manner that promotes simple, quick and largely uniform application and that furthers the general rule favoring disclosure. *Id.* The public agency bears the burden of justifying exemptions from disclosure. ORS 192.490(1).

It appears that the OSP relied upon the ORS 192.502(3). This exemption provides:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The purpose of this exemption is to encourage citizens to provide relevant information voluntarily to public bodies, with some reasonable assurance that the information will be kept confidential. MANUAL 47 (1995).

There are five tests, each of which must be met for the exemption in ORS 192.502(3) to apply. These five tests are:

1. The informant must have submitted the information on the condition that the information would be kept confidential.

2. The informant must not have been required by law to provide the information.

3. The information itself must be of a nature that reasonably should be kept confidential.

4. The public body must show that it has obliged itself in good faith not to disclose the information.

5. Disclosure of the information must cause harm to the public interest.

We consider each of these test to determine if the compliance review report is exempt from disclosure.

The first issue is whether the information was submitted in confidence. OSP obtained information for the compliance report through a review of the tribe's records, interviews with tribal members, staff and employees and observation of the public and nonpublic areas of The Mill Casino. The tribe agreed, through the terms of the Compact, to allow the state to review its records with the express provision that these records and information derived from these records would be kept confidential to the extent provided by the Public Records Law.[2/] The tribe also agreed to provide OSP access to all areas of the gaming facility; access to the non-public areas was conditioned on the understanding that information obtained through observation in those areas would remain confidential. We are informed by Terry Springer, Coquille Tribal Gaming Commission, who spoke with each person interviewed by OSP that each of these individuals provided information to OSP on the condition that the information would be kept confidential. Accordingly, we believe that the information in the compliance review report that was obtained from the tribe was, in fact, submitted to OSP in confidence.

The second issue is whether the tribe was required by law to provide any of this information. The tribe agreed, through the terms of the Compact, to allow the state to review its records and to provide OSP access to all areas of the gaming facility. But for the Compact, the tribe was not otherwise required by law to allow the state to have access to these records or to the nonpublic areas of its facility.

We have previously interpreted the terms "not otherwise required by law" in ORS 192.502(3) to

> appl[y] only to information which is submitted voluntarily when the informant is under no legal obligation, by statue, rule, contract or otherwise, to provide the information.

[2/] The Compact provides:

> Access to Records. The State is authorized hereby to review and copy, during normal business hours, and upon reasonable notice, all records maintained by the Tribal gaming operation; provided, that any copy thereof and any information derived therefrom, shall be deemed confidential and proprietary financial information of the Tribe to the extent provided under ORS 192.410 to 192.505. Any records or copies removed from the premises shall be returned to the Tribe after use. Nothing in this subsection precludes the State or the Tribe from disclosing information subject to the Rules of Civil Procedure or Evidence in connection with litigation, a prosecution or a criminal investigation.

See MANUAL at 47 (1995). Beyond this statement, the MANUAL does not discuss information that is required to be submitted under a contract.

This is the first public records order to expressly consider whether information required by a contract is "required by law" under ORS 192.502(3). In interpreting this statutory language, we look to the text and context of the statute. ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610, 859 P2d 1143 (1993); ***State v. Person***, 316 Or 585, 590, 853 P2d 813 (1993); ***Southern Pacific Trans. Co. v. Dept. of Rev.***, 316 Or 495, 498, 852 P2d 197 (1993). We first look to the text of ORS 192.502(3) and to the plain, natural and ordinary meaning of the word "law." *See* ***State v. Langley***, 314 Or 247, 256, 839 P2d 692 (1992). "Law" is defined as follows:

> a binding custom or practice of a community: a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by a sanction (as an edict, decree, rescript, order, ordinance, statute, resolution, rule, judicial or usage) made, recognized, or enforced by the controlling authority * * * [.]

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993). This definition refers to rules that are generally adopted by a governing body. A contract is an action between two parties; it is not adopted by a governing body as a binding rule. Thus, the plain meaning of the text of ORS 192.502(3), suggests that the term "law" does not include obligations imposed by contract.

We next look to the context of the statutory language, including other provisions of the Public Records Law and other related statutes. ***PGE v. Bureau of Labor and Industries***, 317 Or at 611 (cites omitted). The term "law" is used in both ORS 192.502(7) and (8). ORS 192.502(7) refers to "federal law or regulations"; ORS 192.502(8) refers to "Oregon law." In each case, the reference to "law" is to the enactments of a governmental body. Thus, from the text and context of ORS 192.502(3), we conclude that the phrase "not otherwise required by law" in this provision refers to information that is not required to be submitted pursuant to a governmental enactment such as a statute. Since the tribe was not otherwise required to provide the information to OSP, except by the terms of the Compact, we believe that this test has been met.

The third issue is whether the information is of a nature that reasonably should be considered confidential. Much of the information in the compliance review report is information about security measures undertaken by the tribe to protect the gaming operation. Examples include how and where certain high security items, such as VLT paper stock or gaming chips, are stored; how many security cameras are in place, etc. This information, if disclosed, could affect the security of the gaming operation and facility. Consequently, we

believe that much of the information submitted by the tribe is of a nature that should reasonably be considered confidential. However, some of the information in the report does not meet this element of the exemption, for example, information to which the public has access, such as whether the facility has posted signs prohibiting firearms or facility's policies for making loans to patrons, and other non-sensitive information, such as whether the surveillance room is carpeted. Because of the essential nature of this report, which concerns the security of the facility and its operation, very little of the information in the report that was obtained from the tribe is not of a confidential nature.

The fourth issue is whether OSP obliged itself in good faith not to disclose the information submitted by the tribe. Prior to conducting the compliance review, OSP provided a copy of the compliance review questions to the tribe. These questions had a cover page stating that the information submitted in response to the questions would be kept confidential. Lieutenant Randy Sitton, OSP, also met with the tribe on several occasions to discuss the compliance review, and he verbally assured the tribe that information submitted would be kept in confidence. Based on these actions, it is clear that OSP obliged itself in good faith to keep information submitted by the tribe in confidence.

The fifth and final issue is whether disclosure of information in the compliance review report that was provided by the tribe in confidence would cause harm to the public interest. The public has a significant interest in OSP's having ready access to all aspects of the tribal gaming activities and facilities so that OSP can ensure that the games are conducted fairly and honestly and that the integrity and security of those activities are not threatened or impaired in any way. Full cooperation by the tribe is required in order for OSP to be able to obtain the quantity and quality of information that it needs to make this determination. Failure to keep the commitment made to the tribe in this case that the information provided by the tribe would be kept confidential would likely result in the future refusal by the tribe to provide the necessary level of cooperation for effective compliance reviews. Moreover, failure to maintain the confidentiality of these records would also likely result in decreased cooperation from other tribes during similar compliance reviews.

In weighing the competing aspects of the public interest, we believe that in the present situation, the public interest in maintaining candid and open communications between OSP and the tribe with regard to its gaming operation and security measures requires that the promise of confidentiality be kept. We find that the public interest would suffer by disclosure in this instance.

Accordingly, we conclude that portions of the information provided by the tribe in confidence meet each of the elements of ORS 192.502(3). This information is exempt from disclosure under the Public Records Law.

Conclusion

Based on the above analysis, we conclude that the following information in the report is not exempt from disclosure:

1. The introductory portions of the report consisting of the purpose and conditions of the compliance review, as well as the portions of the report describing the individuals participating in the review and the dates of the review.

2. The summary statements regarding the existence of "compact issues," "areas of non-compliance" and "internal control issues."

3. The portion of the report consisting of the questions used by OSP to determine compliance.

4. The information submitted by the tribe that would not reasonably be considered confidential.

5. The portion of the report consisting of OSP recommendations that do not dislose otherwise exempt information.

As to this material, we grant Poo-sa'-key's petition and order the Oregon State Police to disclose the nonexempt portions of the report. That agency has seven days from the date of this order in which to comply. ORS 192.450(2).

The remainder of the report is exempt from disclosure under ORS 192.502(3) as information submitted in confidence. This includes those recommendations by OSP that by their terms would disclose information provided by the tribe in confidence that meets the exemption in ORS 192.502(3). As to these portions of the report that we find to be exempt from disclosure, we deny Poo-sa'-key's petition.[3/]

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

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[3/] ORS 192.505 provides:

> If any public record contains material which is not exempt under ORS 192.501 to 192.505, as well as material which is exempt from disclosure, the public body shall separate the exempt and non-exempt material and make the nonexempt material available for examination.

OSP must separate the exempt and nonexempt materials as described above and make the nonexempt material available for inspection by petitioner.